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**MEMORANDUM**

Legal Op. No. 12-06

<b>DATE</b>	January 7, 2013
<b>TO</b>	Presidents, Health Care Boards Executive Officer, Health Care Board
<b>FROM</b>	Don Chang, Assistant Chief Counsel Legal Affairs
<b>SUBJECT</b>	<b>Analysis of On-line Marketing Discounts for Medical Services in Light of the Prohibitions in Business and Professions Code Section 650</b>

Please find attached a legal opinion prepared by the Legal Division with regard to the following question:

Does it constitute a violation of Business and Professions Code section 650 when a health care professional shares the advertised fee for services with an internet marketer that promotes the services to prospective patients who in turn must (1) commit to an advanced purchase of the health care service through the internet company, and (2) wait for a predetermined volume of purchases to occur through the internet company, in order to receive the advertised discount?

We concluded that such an arrangement is a violation of section 650. The duties and fee structures that are commonly included in the contractual arrangements between the internet marketers and the health care professionals transforms the role of the internet companies from that of a marketer to that of a referral agency compensated based on the volume of referrals provided. Section 650 explicitly prohibits a health care practitioner from offering or delivering any commission, patronage dividend, or other consideration as compensation or inducement for referring a patient. Therefore, as explained more fully in the legal opinion, this marketing arrangement is a violation of section 650.

If you have questions regarding this opinion, please contact your assigned attorney.

  
By DON CHANG  
Assistant Chief Counsel



**ATTORNEY-CLIENT PRIVILEGED  
MEMORANDUM**

**Legal Op. No. 12-06**

<b>DATE</b>	December 10, 2012
<b>TO</b>	Presidents, Health Care Boards Executive Officers, Health Care Boards
<b>VIA</b>	Don Chang, Assistant Chief Counsel
<b>FROM</b>	Simone Renteria, Staff Counsel
<b>SUBJECT</b>	Analysis of On-line Marketing Discounts for Medical Services in Light of the Prohibitions in Business & Professions Code Section 650

The purpose of this memorandum is to provide you with the Legal Division's opinion in answer to the following question:

Does it constitute a violation of BUSINESS AND PROFESSIONS CODE section 650<sup>1</sup> when a health care professional shares the advertised fee for services with an internet marketer that promotes the services to prospective patients who in turn must (1) commit to an advanced purchase of the health care service through the internet company, and (2) wait for a predetermined volume of purchases to occur through the internet company, in order to receive the advertised discount ?

Such an arrangement is a violation of section 650. The duties and fee structures that are commonly included in the contractual arrangements between the internet marketers and the health care professionals transforms the role of the internet companies from that of a marketer to that of a referral agency compensated based on the volume of referrals provided. Section 650 explicitly prohibits a health care practitioner from offering or delivering any commission, patronage dividend, or other consideration as compensation or inducement for referring a patient. Therefore, as explained more fully below, this marketing arrangement is a violation of section 650.

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<sup>1</sup> All further references are to the Business and Professions Code unless otherwise noted.



I. SUMMARY OF FACTS

Internet marketers such as Groupon and LivingSocial promote discounted products and services to prospective patients<sup>2</sup> within a specific geographical area who, in order to avail themselves of the discounted service, must provide advanced payment directly to the internet marketing company. The company collects this payment, deducts a percentage (generally, a minimum of 25%) as their contracted fee, and remits the balance of the payment to the health care provider. Patients are provided with a discount coupon or voucher, which is then redeemed for services at the health care practitioner's office.

Groupon, Living Social, and BloomSpot are among the most well known online marketing companies, each of which follows the same business model. While the particular operation of each service may vary, they all have in common the existence of a contractual relationship between the internet marketing service and the individual health care practitioner by which the internet marketing service, in exchange for the payment of money, agrees to implement and engage in advertising in the name of the marketing service. Groupon as the largest of these companies is primarily discussed in greater detail below, however these principles apply to internet companies offering substantially similar services.

Groupon's contract to which health care practitioners must adhere include the following terms and conditions:

"Groupon will promote your Offer . . . but will determine the customers and potential customers to whom your Offer is actually promoted and made available in its sole discretion."

"You [the healthcare practitioner] will be paid an amount equal to: the purchase value, less a per-Groupon promotion and distribution fee of twenty-five percent (25%) of the full offer value"

"Merchant wishes to offer its products or services for sale through vouchers (the "Voucher(s)") which can be redeemed for Merchant's goods and/or services at a discount, which are offered to the public for purchase at [www.groupon.com](http://www.groupon.com) (the "Website") and are activated only upon reaching an agreed upon volume of purchasers ("Volume Threshold") and an agreed upon discount."

"The voucher shall be activated which means capable of being used for purchases with the Merchant [the healthcare practitioner] . . . only when the certain volume threshold of purchasers has been met."

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<sup>2</sup> These internet marketing companies advertise coupons for discounted goods and services redeemable at a variety of local and national companies. For purposes of this opinion, only health care services are discussed.

Further, Groupon's terms and conditions that apply to consumers include the following:

"The offer by Merchant is contingent upon a minimum number of units sold (the "Volume Threshold")"

Through the internet company's promotion of the healthcare practitioner's offer, the consuming public is invited and encouraged to contact the internet company in order to purchase healthcare services. Prospective patients are only referred to practitioners who have contracted with the marketing service.

## II. LEGAL ANALYSIS

Business and Professions Code section 650 states in relevant part:

"Except as provided in Chapter 2.3 (commencing with section 1400) of Division 2 of the Health and Safety Code, the offer, delivery, receipt, or acceptance by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration<sup>3</sup>, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest, or coownership in or with any person to whom these patients, clients, or customers are referred is unlawful."

At the heart of section 650 is the prohibition against a healthcare practitioner's offer or acceptance of compensation or other inducement for the referral of patients. "The payment or receipt of consideration for services other than the referral of patients which is based on a percentage of gross revenue or similar type of contractual arrangement shall not be unlawful if the consideration is commensurate with the value of the services furnished." *Business and Professions Code* section 650. Therefore, as a preliminary matter, it must be determined whether the conduct of internet marketing companies constitutes a referral of patients.

### a. Referral of Patients vs. Advertising of Healthcare Services

It is a well-established principle of statutory construction that in construing the law and the intent of the Legislature, the words within a statute are given their usual and ordinary meaning within the context of the statute as a whole. *People v. Robles* (2000) 23 Cal. 4th 1106, 1111. If the language of a statute is unambiguous, it is presumed that the Legislature meant what is said and the plain meaning of the language governs and must be applied according to its terms. *People v. Pecci* (1999) 72 Cal.App.4th 150, 1505.

The verb 'refer' is defined as "to send or direct for treatment, aid, information, decision." *Webster's Third New Int'l. Dict.* (1993 ed.) at p. 1907, def. (2a). Further, a 'referral' is defined as "the process of directing or redirecting . . . a patient . . . to an appropriate specialist or agency

<sup>3</sup> Prior to 1971, section 650 prohibited the "offer, delivery, acceptance or receipt . . . of any unearned rebate, commission, or other unearned consideration." In deleting the term "unearned" from the statute (Stats. 1971, ch. 1568, p.3148, section 1), the Legislature broadened the scope of the prohibition and thereby made any refund, commission or other consideration for referring a patient unlawful, whether it is earned or not.



for definitive treatment.” *Id.*, at p. 1908, def. (1b). Therefore, “the phrase “referral of patients” used in section 650 means the directing of a patient to a health care practitioner by someone other than the patient or the practitioner who will provide services for the patient.” 65 Ops.Cal.Atty.Gen. 252 (1982).

As discussed above, Groupon employs the same business model as many other internet marketing services and its terms and conditions specifically states that it will independently, and in its sole discretion, determine the customers and potential customers to whom the healthcare practitioners offer is actually promoted and made available. This method of selection of patients/customers in order to take advantage of promotional services provided by healthcare practitioners constitutes a referral under section 650.

b. Violation of Business and Professions Code Section 650

The Legislature enacted section 650 in part to prohibit patient referrals based on considerations other than the best interests of the patients. “The evil to be proscribed by section 650 is not just the payment for the referral, but also any relationship where the referral may be induced by considerations other than the best interests of the patient.” *Beck v. American Health Group Int’l, Inc.* (1989) 211 Cal.App3d 1555, 1564 (quoting 63 Ops.Cal.Atty.Gen.89)

Groupon-type services links the third-party’s compensation to the number of patients who purchase the coupon. As a result, referrals are not premised upon the needs and best interests of the patients, but rather is based upon economic considerations. The discount conferred upon a purchaser of the internet marketer would enhance the marketer economically. The offer would be a marketing tool for the entity to use in soliciting new purchasers. The partnership between the health care practitioners and the entity would thus not only benefit the practitioner in obtaining new patients, but also the internet marketer. Therefore, the referrals are induced by considerations other than the best interests of the patients. Moreover, the “Volume Threshold” requirement that is imposed provides an inducement for increased referrals based on its direct relationship with income.

Since the prohibitions contained in section 650 extend equally to the offer of compensation as it does to its delivery, receipt, or acceptance, it is inconsequential whether payment is actually intended or made as the mere offer alone is sufficient to violate section 650’s strictures. *See People v. Hering* (1999) 20 Cal.4th 440, 446. Further, in 1971, section 650 was amended to delete the word “unearned” before the words “rebate” and “consideration” making it immaterial whether compensation is actually earned.

Therefore, even in the event that Groupon’s established “Volume Threshold” is not met, the patient’s voucher is never activated, and Groupon’s 25% fee never collected, section 650 would nevertheless still be violated as the offer of compensation for the referral of patients occurs at the time that the healthcare practitioner enters into a contractual arrangement with the internet marketing company.

Additionally, in order to avail themselves of the proffered discounted services, prospective patients must often pay the third-party internet marketer the full cost of the service to be

performed in advance of any consultation or examination with the healthcare provider. Such an arrangement cannot be said to be in the best interest of the patient.

### III. CONCLUSION

Section 650 explicitly prohibits a health care practitioner from offering or delivering any commission, patronage dividend, or other consideration as compensation or inducement for referring a patient. The duties and fee structures that are commonly included in the contractual arrangements between the internet marketers and the health care professionals transforms the role of the internet companies from that of a marketer to that of a referral agency compensated based on the volume of referrals provided. Therefore, as explained above this marketing arrangement is a violation of BUSINESS AND PROFESSIONS CODE section 650.